No. 56.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

October Term, 1891.

EDWIN D. CARTER,
Plaintiff in Error,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL McMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE and RICHARD ROE,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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STATEMENT OF THE CASE.

Ejectment, Complaint filed April 12, 1889. Idaho was then a Territory. July 4, 1890, Idaho became a State. July 14, 1890, Plaintiff filed his petition for transfer of said cause to the Circuit Court of the United States for the District of Idaho, upon the grounds following:

1st. That at the time of the commencement of the action, April 12th, 1889, the land and premises in dispute and sought to be recovered, were, and at all times since, have been and now are of the actual value of more than five thousand dollars, ($5,000.)

2nd. That at the time of the commencement of said action the Plaintiff was, and at all times since has been, and

now is a citizen of the State of Wisconsin, and that at the time of the commencement of said action, all and each of Defendants were, and ever since have been, and now are citizens of the Territory, now State of Idaho.

3rd. That a Federal question was involved, in this, calling for the construction by the Court of the laws of the United States, authorizing the issue and location of Sioux Half Breed Scrip, issued under the Act of Congress, approved July 17th, 1854, and also the construction of Sections 2387 to 2389, Revised Statutes of the United States relating to town sites, upon the public lands, and as well as the determination of the question of whether Section 4556 of the Laws of Idaho, is or is not inconsistent with the Laws of Congress governing the possession and disposition of the public lands. (See Transcript folios 148 to 151).

Upon this petition the cause was then transferred to the Circuit Court.

The premises sought to be recovered are certain lots, situated in the town of Wallace, Idaho, being all of the lots in the north half of Block No. 22, except lots 12 and 20.

The averment being that on the 19th day of February, 1889, Plaintiff was seized and possessed and entitled to the possession of the north half of Block number 22, in the town of Wallace, Idaho, as said half block is described on the plat of said town, and that the Defendants on said day, entered and ejected Plaintiff therefrom, except lots 12 and 20 in said Block No. 22. (See Transcript, folio 4).

The Defendants answered separately, denying specifically the seizen, possession and right of possession of the Plaintiff to any of the said north half of said Block 22, save and except lots 12 and 20, on the 19th day of February, 1889, or at any other time, and plead specifically that on said day, the said lots, entered, held and claimed and improved by him, were public lands of the U. S., entirely vacant and unoccupied, and were not owned, held or occupied by any person or persons for any purpose whatsoever, and while the same were so vacant and unoccupied, they entered, located and appropriated said lots as residence or town lots, that after entering, they placed written notices thereon, describing the lots so located, with the name of the locator and date of location, enclosed the same,

and built a substantial house thereon and have since resided there, etc.

The Defendant Ruddy, claiming lots 2 and 4, in Block 22, and entering on the 19th day of February, 1889. See Transcript, folios 20 and 21).

The Defendant Charles F. Robbins, claiming lots 10 and 24, and the date of his entry and location being the 25th day, of February, 1889. (See Transcript, folios 12 and 13).

The Defendant Michael L. Murray, claiming lots 6 and 8, and the date of his entry and location being the 19th day of February, 1889. (See Transcript, folios 15 and 16.

The Defendant Fredrick A. Stevens, denies specifically all the allegations of the complaint. On the trial it was shown he located and appropriated lot 18, in Block 22, on the —— day of——1889.

The Defendant C. M. Patterson, claiming lot 22, in said Block 22, and the date of his entry and location being March 7th, 1889. (See Transcript, folios 25 and 26).

The Defendant, M. J. Donnelly, claiming lots 14 and 16, and the date of his location and entry being February 23rd, 1889. (See Transcript folio 29.)

The answers were filed June 24th, 1889, and not 1891, as averred in Plaintiff's brief, the cause being transferred July 14, 1890, to the Circuit Court of the United States. The Defendants demanded separate trials, which were refused, and the case was tried jointly as to all.

The facts shown at the trial were substantially as follows:

The tract consisting of 80 acres, unsurveyed public lands of the United States, upon which the town of Wallace now stands, was located as a placer claim in 1884 and known as Placer Centre, or an attempt was made to get some kind of title under said location, for the purpose of locating a town site. It being the only piece of land fit for that purpose in proximity to the new mines and mining camps, situated in the several gulches that unite at this point. In 1884 it was located as a town site by one Dowd and Wallace. (See Transcript folios 201, 202, 203 and 204.)

In 1886, May 30th and 31st, the 80-acre tract was surveyed by George R. Trask, the field notes were filed in the

United States Land Office, and upon this plat the Register and Receiver's receipt was issued. (Exhibit "A," folio 62 Transcript.) The field notes are designated as "Field Notes of "Survey of the claim of W. R. Wallace, in Placer Center "Mining District, Shoshone County, Idaho Territory, as "officially surveyed for United States patent, by Geo. R. "Trask, United States Deputy Mineral Surveyor. Surveyed "May 30th and 31st, 1886." (Transcript folio 64.) Upon this tract Sioux Half Breed Scrip No. 430 letter C was located by Wallace, Walter Bourke being the Scripee, and the Register and Receiver's receipt issued to Wallace under date of June 5th, 1886. Immediately after the survey of the 80-acre tract on the 30th and 31st of May, 1886, Trask, at the request of Wallace, surveyed the same into blocks, lots and streets, platted the same, made a map, and marked the blocks upon the ground, and many of the blocks he staked the lots upon the ground. This he did with reference to Block 22. The lots were 25 feet by 100 in depth, running to an alley in the middle of the block; the alley was 25 feet wide.

Large stakes were placed at the four corners of the block 22, and put small stakes on the north and south sides of the block to mark where the lots would be. (See Trask's testimony, folio 200, Transcript.) Trask finished this platting and survey about the first or second of June, 1886, and made a map of the town for Wallace, of which Defendant's Exhibit 13 is a copy. The map, Exhibit 13, has been generally recognized as the map of the town of Wallace in reference to the dealings and sales made under it. (Folio 199, Transcript). Trask made the survey for Wallace, (Exhibit A.) "I made that survey, Col. Wallace employed me to make it, claiming that he was going to locate Sioux Scrip upon the eighty acres. That survey is correct. I handed it over to Col. Wallace. Don't remember hearing the word Bourke used. Wallace simply told me he was going to locate Sioux Scrip upon it. He did not tell me where he got the scrip. I understood that I was making the survey for Mr. Wallace. I never heard a word about Walter Bourke." (Transcript folio 198.) After the issuance of the Register and Receiver's receipt, Plaintiff in June, 1886, made an agreement to buy the block in question, 22 from Wallace. Saw the Register and Receiver's receipt, (Exhibit A, folio 62, Transcript.) Also Exhibit B, (Folio 68, Transcript) were shown him, but he did not see Walter Bourke

the Scripee, although he says afterwards in 1889, he went to Winnepeg, Canada, to find the Indian. His dealings were exclusively with Wallace. His agent, Howes, was with him. Plaintiff was a lumberman from Wisconsin. Howes had been in his employ for years. The agreed price for the block was $600. He was also to bring in a stock of goods, a saw mill, erect the same, and he was to have this block 22, or another. Howes was to select the block. He also bought all the lumber off the entire eighty acre tract, including block 22, at one dollar per thousand to be scaled at his mill. Block 22 was pointed out to him and he also saw the map, (made by Trask). He went around the block. He left Howes to represent him and went to Portland, shipped in the saw mill and stock of goods. Howes went into possession of block 22 in the latter part of July or August, 1886 and cut timber for the mill off of that block and the balance of the eighty acre tract. Carter did not enter into the possession of block 22, under the deed Exhibit C. This is apparent from the testimony of both Carter and Howes. Carter says:

"Mr. Howes remained on the ground, came back from " Portland with the saw mill". (Folio 85 Transcript.) "I " left it to Mr. Howes to select the block. Howes was cutting " timber for manufacturing purposes when I returned (October, " 1886.) I could not say whether he was in possession of the " block 22, or not. He was in possession of the ground, so " far as cutting logs to haul to the mill was concerned. I had " bought the timber off of the whole townsite, or so much as " I wanted." Howes testifies, on cross examination (Folio 106 " Transcript.) "I remember testifying on a former trial here " in which Mr. Carter was Plaintiff and certain parties De- " fendants, with referance to certain property on the South " half of that block. I think in that case I did testify that I " entered into possession sometime about the 31st of July, " 1886, for Mr. Carter. I picked the lot out about 31st of " July for Mr. Carter as his agent. I picked the lot out. I " did not think it was necessary to hold it for possession, " because he was going to make a deed out for Mr. Carter, for " him. I did enter into possession of this block on the 31st " of July and prior to the execution of the deed from Mr. " Wallace, as agent for Walter Bourke to Mr. Carter, if that " is what you call possession. I picked the lots out and I so " testified."

The deed under which Plaintiff claims, Exhibit C (folio,72 Transcript) is dated July 31st, executed that day, and witnessed by Howes, recorded on the 18th of October, 1886, at Murray (twenty miles distant) at the *request* of Wallace.

We call the attention of the Court to the testimony of Carter and Howes upon the matter of this deed and its delivery.

Exhibit C, under which Plaintiff claims, describes the premises as follows:

"All that lot, piece, or parcel of land situate &c. in Wal-
" lace, County of Shoshone, Territory of Idaho, particularly
" described as follows, to wit: Block 22 (twenty-two) in said
" town of Wallace, consisting of twenty-four town lots, each
" 25 x 100 feet, and bounded on the north by Lockey street,
" on the south by Bank street, and on the west by Sixth
" street, on the east by Seventh street; the title of said land
" having been vested in the party of the first part by location
" of half-breed Sioux scrip, issued to the said Walter Bourke
" under an Act of Congress of July 17th, A. D. 1854, in ex-
" change for lands held by said party of the first party at
" Lake Pepin, Minnesota, and now located and duly recorded
" in the United States Land Office, with field notes of survey,
" as provided by said Act of Congress, at Coeur d'Alene City,
" Idaho Territory." (Transcript, folio 72.)

The deed under which Plaintiff claims, defining the tract as twenty-four town lots, 25 x 100 feet, and also designating the source of the title under which the grantor claimed and conveyed, and the Act of Congress, July 17th, 1854, as the source of the title.

The block was *never cleared* nor enclosed by Plaintiff. Timber was cut off therefrom and hauled to his mill, but for that purpose alone. In fact, he bought the timber and paid at the rate of $1.00 per thousand. This, by the testimony of all the witnesses, is apparent. What cutting was done was done alone for that purpose. Snags, stumps and down timber were left upon the premises, and no evidence of possession left by enclosure or improvements upon the lots located by Defendants. On lots 12 and 20, Plaintiff erected a building on each lot respectively. The other lots, 2, 4, 6, 8, 10, 14, 16, 18, 22 and 24, were not inclosed, improved or occupied at the time of the entry of the Defendants.

An attempt was made to show an enclosure by means of a sidewalk, or a partial enclosure of the block on the West side and a part of the North side, and about 50 feet on the South side. The so-called sidewalk on the West side was a footway about 4 feet wide, built for the purpose of accommodating passengers from the depot to the North of Cedar Street, connecting with a sidewalk on 6th Street, leading from Arment's Hotel to the depot of the N. P. R. R. and was not built for the purpose of enclosing the block or improving the same, but was built in 1887 after the R. R. came in for the purpose of bringing travel from the depot down 6th Street to the hotel of Plaintiff, the Carter House, erected on block No. 21. (See Hanley's testimony, Transcript, folio 216.) The piece of sidewalk so called on the South side of block 22, consisted of three planks laid lengthwise, from the corner of 6th Street running East fifty feet to the porch in front of a building erected by one McKissick on lot 5 in block 22. Said lot 5 having been purchased by McKissick from Plaintiff. This side walk was built in the fall of 1888 by C. A. Baldwin, for one Lane, a tenant of McKissicks, and paid for by Lane and not by Carter. (Transcript, folio 215.) The so called side walk on the North side consisted of a foot way 4 feet wide and was built in 1888 to connect the building on lot 20 with 6th Street, and was not built for the purpose of enclosing the block, and not erected until after the R. R. came in 1887. The building on lot 12 was not erected until 1887 and was left without a connection with 6th Street until the footway from lot 20 was built in 1888.

An effort was made to show that Plaintiff had otherwise improved Block 22, by bringing water upon the block. Carter had brought water to his hotel on Block 21. Afterwards the water was taken out above and beyond the town of Wallace, on the mountain side, and a company organized for the sale of water to the citizens of the town, and known as the Wallace Water Company. Carter was one of the promoters of the scheme, and a stock holder, and received his share of the profits. The occupants of Block 22 bought this water as furnished to them and other citizens of the town. (Transcript. Ruddy's testimony, folio 211; Moffit, folio 122, and Carter, folios 94 and 95.

It was shown upon the trial, that on the 24th of January, 1887, the location made June 5th, 1886, by Wallace, attorney in fact of Walter Bourke, with Sioux Half Breed Scrip, No.

430 C., upon the tract in question, was cancelled by the Commissioner of the General Land Office. (Transcript, folio 153.)

The language of the Commissioner, and grounds assigned, being: "It appears from the records of the office, that a duplicate of said piece of scrip has been issued by proper authority, and that the same was located March 9th, 1880, by Henry T. Wells, attorney in fact, upon the south ½ of S.W. ¼ of Section 29, Tp. 125, N. R., 62 W., Dakota Territory, and that a patent for said tract was issued December 10th, 1881. This scrip is not by law transferable, and any assignment or conveyance of the same is therefore void, and it is so stated on the face of each piece thereof. The claim of the scripee against the Government, represented by said piece of scrip, was satisfied when the Government gave him title to the land embraced in the location made with the duplicate piece of said scrip as above set forth, therefore, the original of said piece of scrip is of no effect so far as the scripee is concerned, but belongs to the Government. In view of the foregoing, I have this day cancelled the location involved and retain the scrip in the custody of this office. You will correct your records and notify the parties in interest."

In pursuance of this letter and decision, the Register of the Coeur d'Alene Land office, duly notified W. R. Wallace on the 3rd day of February, 1887, of this decision, and that the location made by him as the attorney in fact of Walter Bourke, of this scrip had been cancelled and the scrip retained, and giving the reasons for the decision as above recited, (Transcript, Folio 155.)

The Transcript, folios 152 to 170 inclusive, shows the application, the surrender of the script, 430, C, and the issuance of the patent to Walter Bourke by the United States in lieu of said scrip, 430 C, eighty acres; the patent reciting the issuance of the scrip under the Act of July 17th, 1854, and the Act amendatory thereof, of May 19th, 1858, and further reciting that there had been deposited in the General Land Office of the United States, a certificate of the R. R. of the land office at Fargo, Dakota Territory, No. 15, "whereby it appears that the scaip certificate, No. 430 C, for eighty acres issued in favor of Walter Bourke has been located and surrendered by the said Walter Bourke in *full* satisfaction for the south half of the south-west quarter of Section twenty-nine in

" township one hundred and twenty-five, north range, sixty-
" two west of the fifth parallel Meridian, in Dakota Territory."

The grantee of the patent is Walter Bourke, was issued to him, and so recorded, and passed the great seal, and bears test December 10th, 1881.

It appears from folios 161, 163, 165 of Transcript, the original of this scrip 430 C, 80 acres, issued November 24th, 1856, to Walter Bourke, and a duplicate thereof, are fully set forth, with the certificate of Henry R. Clum, Acting Commissioner of Indian Affairs, that the same "is a true copy from " the records of this office of the original certificate issued to " Walter Bourke, and as such the holder thereof is authorized " to use it the same as if it were the original, which original, " it appears from *satisfactory evidence furnished* this office, has " been lost."

This is certified as correct, under date of July 26th, 1871, by the Secretary of the Interior. The evidence in full, certified by the Commissioner of the General Land Office (Transcript, folio 160) is given in the Transcript (Transcript, folios 160 to 194 inclusive), for the issuance of the duplicate scrip, called "bogus" by Plaintiff's counsel in their brief, by the proper officers of the Government.

These facts are conclusively established:

1st. That this duplicate scrip was issued by the proper officers of the Government, after *satisfactory* evidence that the original had been lost.

2d. That this scrip was located and surrendered in March, 1880, on certain lands in Dakota, and a patent for eighty acres issued to the scripee, Walter Bourke.

3rd. That by such location and surrender and patent, the law of 1854 was fully satisfied, and the scrip not being assignable or transferable, Walter Bourke had received eighty acres of land in lieu of that " relinquished by Walter Bourke to " the United States of all his right, title and interest in and to " the reservation of land lying on the west side of Lake " Pepin, &c.," as stipulated in the Act, and by the terms of the scrip itself. (Transcript, folio 161.)

If fraud and perjury exist, and as so charged in Plaintiff's brief, page 19, it is on a close scrutiny upon the side of

the subsequent location of the original scrip in '86 by Wallace, rather than in the issuance of the duplicate in 1871.

The decision of the Commissioner cancelling the location was sustained by the Secretary of the Interior.

In 1886 the Wallace Townsite Company was incorporated, and Bourke's location by Wallace, of the whole tract, was transferred to this company, Wallace was the President, Albert Allen, att'y for Plaintiff was Secretary, and the Plaintiff a prominent stockholder.

In 1888 the inhabitants of the town of Wallace were by the Board of County Commissioners, duly declared a body corporate and politic, by the name of "The Inhabitants of the Town of Wallace," and W. R. Wallace was appointed Chairman of the Board of Trustees (Trans. folios 194–198).

In February, 1889, two years after the decision of the Commissioner cancelling the location of this Sioux Scrip, the Defendants entered and located the respective lots claimed by them respectively. Enclosed and improved the same by building thereon. Evidence of the value of these improvements was offered but refused.

The Plaintiff offered in evidence tax receipts which were allowed over the objection of Defendants. Exhibits E., F. and G. (Trans. folios 80, 81 and 82.) The first two were for the County taxes for the years 1887 and 1888, and the last town taxes for the year 1888. These were all the tax receipts offered. In the last two it will be observed the lots in Block 22 are listed by lots. After 1888 taxation ceased.

On the 19th of February, 1889, and after several hundred lots were located by different citizens of the town of Wallace, Howes, the agent of Carter, came with a written notice to locate lots 2 and 4, but found Ruddy in possession. Howes wrote several notices and located lots in the town on the 19th other than in block 22, while his partner, King, posted notices, written by Howes on the 19th and located lots 9 and 11 in this Block 22, and other lots outside of 22. In fact every witness examined on both sides except possibly Moffitt, located lots in Wallace at this time, including Bell, another agent of Carter.

It is safe to say that on the 19th day of February, 1889, and within a short time afterwards, a few days, every lot in the town of Wallace, not enclosed or built upon, was located by the inhabitants respectively. It will be observed that during the whole of this time, from the survey in May, 1886, the platting into town lots, the location of the scrip and the purchase by Carter, Walter Bourke does not appear upon the scene, although the scrip in express terms, limits the right of location to the Scripee alone, upon lands, "upon which they have respectively made improvements." No one ever saw the Indian. Carter started afterward, he said, to Winnepeg, Canada, to hunt this Indian, but did not find him. Wallace and Wallace alone was the party interested. When or how he got the scrip does not appear. The power of attorney was made in blank, (Exhibit C, folio 72, of Transcript). It was acknowledged and executed on the 27th day of February, 1883, at Winnepeg, before the American Consul, and authorizes Wallace to enter upon and take possession of any and all pieces of land which "we now own in the Territory of Idaho, under and by virtue of location of Sioux Half-breed Scrip, No. 430, letter C, for eighty acres, issued to me, Walter Bourke, etc."

On the 27 of February, 1883, the tract of land known as Wallace was an unknown country, and the scrip was not located thereon until June 5th, 1886, some three years and six months after the acknowledgment and execution of the Power of Attorney. The Power of Attorney was executed in blank, and subsequently filled in. This was apparent from an inspection of the instrument itself. A fraud condemned in the several opinions of the Commissioner and Secretary of the Interior in like cases.

"The scrip is not assignable, and any assignment or conveyance of the same is therefore void" is disclosed upon the face of the scrip. Upon the trial Wallace was not produced or called.

It will be observed that the map introduced by Carter, Exhibit D, and upon which he testified, does not correctly designate block 22. It is not cut up into lots according to the calls of his deed (Exhibit C), and even the alley in the center of the block is not put down.

The Defendants answered separately, claiming specific lots, and demanded separate trials, which were refused.

It is proper to state that Exhibit A (Trans. folio 62) was offered and introduced in evidence over the objection of the Defendants.

Since the trial of this cause, the 80 acre tract upon which the scrip was attempted to be located, and embracing the premises in controversy has been patented to the Trustees of the town of Wallace and their successors (notwithstanding the strenuous protest of Plaintiff) in trust for the inhabitants of said town by the Government of the U. S. under the provisions of section 2382 et seq. relating to townsites, and that Plaintiff as well as these Defendants and their grantees have applied for deeds to their respective interests, under section 2200 to 2214 inclusive, Laws of Idaho, relating to townsites.

ARGUMENT.

FIRST.

The Register and Receiver's receipt and certificate of location (Exhibit A.) of the Sioux Half-breed Scrip 430 C. for 80 acres, issued to Walter Bourke and located by Wallace, as Attorney in fact, is incompetent testimony, and should not have been allowed in evidence. Upon its face it was a mere equitable title.

In the Federal Courts ejectment can only be had upon the strict legal title, and Courts of Law of the United States do not enforce in that manner an equitable title, whether evidenced by a certificate of purchase, a Register and Receiver's receipt, a certificate of the location of scrip, or any entry short of patent.

Langdon vs. Sherwood, 124 U. S., 85.

Bagnell vs. Broderick, 13 Pac. R., 430.

Johnson vs. Sherwood, 13 Pac. R., 436.

Johnson vs. Christian, 128 U. S., 382.

Hooper vs. Scheimer, 23 Howard, 235.

Foster vs. Mora, 98 U. S., 425.

Fenn vs. Holme, 21 Howard, 481.

The Court instead of excluding such certificate, Exhibit A admitted it and the deed Exhibit C, and instructed the jury as follows (Transcript folio 224.)

"I now instruct you in an action like this in the United "States Courts, such certificate issued by a land office of an "entry of land, cannot be received as any evidence of legal "title, and the deed referred to (Exhibit C) being based upon "such an entry cannot be considered as evidence of a legal "title, or of a title in fee, and as evidence of title you will "entirely disregard them, and that the only consideration you "can give to either said certificate of entry or said deed, is as "evidence to explain Plaintiff's original entry upon the pre-"mises, to explain his claim to the possession thereof, and to "show his good faith in the claim he asserts."

If under the authorities above quoted, the certificate is incompetent testimony to prove title, or if in the language of the instructions, cannot be received as any evidence of title, and the jury are to disregard both the certificate Exhibit A, and the deed, exhibit C, thereunder, as evidence of title; where then is the Federal question involved?

The petition for removal (Trans. folio 148), assigns as the Federal questions, that Plaintiff claims title under a deed from Walter Bourke, a Sioux Half-breed who had previously entered the premises in the U. S. Land Office, by the location of Sioux Half-breed scrip issued him under the Act Congress, of July 17th, 1854, and also, claims title thereto under the United States by reason of prior occupancy, while Defendants claim that the entry of Bourke was illegal, and also claim that Plaintiff has not complied with Section 4556 of the laws of Idaho.

We submit that there is no Federal question involved. The certificate of location, Exhibit A, and the deed thereunder, are incompetent as evidence to prove title, and under the decisions, there is an end of it. Occupancy and possession are matters of fact, and make no Federel question, nor does Section 4556, laws of Idaho, involve any.

The other ground, diverse citzenship has already been decided. That it is a question of diverse citizenship, between citizens of different State, and does not apply to the citizens of a Territory and citizens of a State, as appears by the petition for transfer herein. (Trans., folio 148).

This has been decided by Judge Sawyer, in 1891, in *Johnson* vs. *Bunker Hill and Sullivan M. Co.*, and also in same year by Mr. Justice Knowles of the District of Montana, and Mr. Justice Hanford, of the District of Washington.

A motion was made to dismiss for want of jurisdiction on the conclusion of Plaintiff's testimony, by the Defendants, but was denied. This does not appear in the transcript. We now ask for a dismissal of the cause upon the ground that neither the Court below, nor this Court had or has jurisdiction of the cause, either upon the ground of diverse citizenship, or upon the ground that a federal question is involved, as appears by the transcript herein, and for the reasons above given. This motion can always be made, at any stage, and in any Court of the United States.

II.

The refusal of the Court to allow the introduction of Exhibit J (Trans. folios 142 and 143) was not error.

The entry of Defendants Ruddy and Murray was upon separate lots on the 19th of February, 1889, viz.: Ruddy upon 2 and 4 and Murray upon 6 and 8. Exhibit J is a notice to them jointly, and dated February 27th, 1889, eight days after the entry and enclosure of said premises by Ruddy and Murray, and while they were in possession improving said lots. The paper reads "that the said lots belong to me by *regular* "*grant*, and I am entitled to the possession of the same by " reason of occupation and improvement. You are therefore " commanded to vacate said premises, or you will be ejected " according to law. E. D. Carter by G. I. Bell." Appended to which was an affidavit of Bell that Carter was a non-resident, and that he served the same on the 27th of February, 1889; and was sworn to before Wallace, Notary.

The Court very properly excluded this notice.

If Carter was the owner " by regular grant" the notice of that fact could not validate or effect the grant, and if he was "entitled to the possession of the same by reason of occupation and improvement" the lots would show for themselves such occupation and improvement, and a mere declaration of "such occupation and improvement" eight days after the entry

of defendants Ruddy and Murray, and after the enclosure of said lots 2 and 4 and 6 and 8, by them respectively, and while they were in the actual possession thereof, Ruddy of 2 and 4 and Murray of 6 and 8 improving the same, by clearing off stumps, down timber and logs, for the purpose of building thereon which they proceeded to do, could have but little relevancy either to strengthen Plaintiff's grant, or evidence his "occupation and improvement."

Counsel for Plaintiff, page 15 of their brief, say "If this "proof were not admissable for any other purpose, it certainly "had the tendency to show that the Plaintiff's claim had not "been abandoned." If said lots belonged to Carter "by regular grant" and he was entitled to the possession of the same by reason of occupation and improvement," how could this notice show he had not abandoned either the regular grant or the improvements? Abandonment was not in issue. Carter had nothing to abandon. The lots in question he had never improved, he had never cleared the lumber from them, had never built upon them or enclosed them. The timber that he did cut off from them he so cut for his saw mill, and paid Wallace for the same, at the rate of $1.00 per thousand, and not for the purpose of improving the lots. The stumps were left, close together, and of a large size, from 18 inches to 8 feet in diameter, snags, down timber, and stubs covered these lots, and the otners entered and located by the other defendants. A trail crossed these lots, the common highway for travel through lots 2 and 4 and across the block 22, to the south to Bank Street, to the Heller House. All mute evidences of Carter's alleged improvements and occupation.

The rule is that "occupation and improvement" be shown by the premises themselves. No subsequent declaration after the occupation and possession by another can avail. The character of Carter's occupation and improvement of these lots, and that the same was a sham and pretext, is shown from the fact, that Henry Howes the "Fides Achates" came, notice in hand, on February 19th, 1889, to locate lots 2 and 4, but found Ruddy already in possession, and wrote notices for his partner King, who on the same day, February 19th, 1889, located lots 9 and 11 in said Block 22. Much has been said about the payment of taxes in December, 1888, (see Exhibits F and G, folios 81 and 82 in Transcript). An examination of

these certificates show that the Block 22, was not listed as a whole, but only certain lots, described therein by their numbers. Lot 5, which he had sold to McKissick, Lot 17, which he had sold to one Strack, and the northern 25 feet, of Lots 1 and 3, which he had sold to one A. E. Sherwin, and Lot 7, which he had sold to his agent, H. E. Howes, are not listed.

Exhibits F and G, are incompetent to prove possessession, and should not have been admitted.

The payment of taxes furnishes no evidence of possession.

Woods' Limitation ot Actions, Sec. 565.

Again, who paid the taxes on these several lots in this block 22 in 1889, 1890 and 1891? Why cease at 1888?

III.

There is nothing in the assignment of error upon the introduction of Exhibit 1, being the petition of Plaintiff for the transfer of the cause to this Court.

The documeut was a part of the files in the cause, as much so as a pleading.

Carter's testimony and cross-examination show distinctly where he was and where he resided, and how he held and claimed these lots in controversy.

To presume "the jury could only understand, from the ad-"mission of such testimony, that if it appeared that Carter's "residence was in Wisconsin, he could not hold lands by "possessory title in Idaho," would be to place their intelligence upon the same plane as this proposition itself. No suggestion of the kind was ever hinted, thought or dreaut of, until it appeared in Counsel's brief. The instructions of the Court more than protected Mr. Carter and his alleged possessory claim.

IV.

The assignments of error Nos. 3, 4, 5, 6, 7, 8, 9 and 10, referred to and covering from page 16 to 21 of Plaintiff's brief, are not well taken. The argument here is somewhat confused, but as we understand it, the following propositions are contended for:

1st. That under the Act of July 14th, 1854, under which this Sioux Scrip 430 C. was issued to Walter Bourke, no patent was necessary to vest the title; that it was a mere exchange of land. Bourke surrenders his interest in the Lake Pepin Reserve for other lands to be located by him. That the mere act of application and surrender of the scrip constitutes the title.

2nd. That the application and surrender of the original scrip to the Land Office at Coeur D'Alene, and the R. and R. certificate vested the title in Bourke, and through his deed to Carter, in him, to the premises.

3rd. That the Commissioner of the Land Office had no right to cancel the location of this scrip, and to annul the action of the local office at Coeur D'Alene, and retain the scrip.

4th. That the proceedings of the Land Office in issuing the duplicate scrip to Walter Bourke, in 1871, in lieu of the original, was illegal, and the surrender of this duplicate scrip, and the location in 1880, upon lands in Dakota, and the issuance of Patent to Bourke in 1881 for such lands, was incompetent testimony. and could not "nullify the rights of those who " acquired title by the location of the genuine scrip, for it was " beyond its power " * * * *." The Department cannot " deprive the owner of the genuine scrip of the benefit it con- " fers, or deprive him of its rights, or his grantees, without " notice, because it has committed a blunder, thus imposing " upon the innocent, the penalty due its own mistake."

5th. "That the deed to Carter was not open to any " attack. The Land Office had exhausted its powers when it " accepted the scrip and approved its location; the title of the " Government to the land embraced in it passed." (Plff's brief, p. 18).

If this last proposition be true, there is an end of the case.

The Local Land office at Coeur D'Aleue, in accepting the scrip, did not bind the Government.

" The Commissioner has competent authority to suspend " the entry on which the certificate is founded by virtue of his " superior control over the acts of his subordinates."

Hosmer vs. Wallace, 47 Cal., 461.

And when he suspended the entry, it was held that the certificate was also suspended, and as long as the suspension continued the certificate remained in obeyance, and was inoperative as a muniment of title.

Figg vs. Hensley, 55, Cal., 299.

The law of July 17th, 1854, issued this scrip to Walter Bourke, with their conditions attached:

1st. That it was not assignable, and any assignment (no matter in what manner attempted, by transfer, power of attorney, or other device,) was void.

2nd. That Walter Bourke, and he alone, could locate thus upon the "unsurveyed lands of the United States upon which he had made improvements." The scrip itself states the law and these conditions upon its face. The application is made by the scripee, and the location made, the land designated, and the scrip surrendered upon them. The local land office issues but its certificate of purchase; but the certificate of the application, and the surrender of the scrip, is issued to the locator and scripee. The scrip and the application are then forwarded to the General Land Office, and if approved, the Patent issues. This is the course prescribed by the circular letter of the Secretary of the Interior, May 28th, 1878. (Plff's Brief, p. 23.) "No certificate of purchase is to be issued, the scrip and appli-"cation instead of certificates of purchase being the instruments "of title, which are to be returned to this office in this class of "business."

Upon this letter Counsel bases the assertion that no patent is necessary.

Again: Counsel says it is an exchange of lands. Granted! The records of the Land Office show that Bourke located this piece of scrip in 1880 on lands in Dakota, and for the 80 acres surrendered in 1881 procured a patent for 80 acres in Dakota. The law of 1854 was satisfied and the scrip 430 C. was also. The exchange had been made and Bourke had obtained his 80 acres in Dakota for the 80 acres surrendered in the Lake Pepin Reservation.

Plaintiff argues that this was upon the duplicate scrip, and not upon the original, and that the holders and claimants under the original are innocent parties and cannot be affected thereby.

The scrip not being assignable, Bourke upon the one side, the United States on the other are the only parties to this contract for the exchange of lands. Bourke surrenders his interest in the Lake Pepin Reserve, and obtains the right of locating his 80 acres upon other lands of the Government, he makes his location, receives his patent, and the exchange is completed. This ends the matter. Wallace, or Carter cannot complain. They are not in the position of innocent parties. Carter knew he was dealing with a title (Exhibit A) derived from an attempted location of this scrip, that the scrip was not assignable, that Bourke alone could locate, and alone locate upon the unsurveyed lands of the United States upon which he, Bourke, had made improvements.

Carter saw the scrip, and the certificate of location. Nay more, the deed, Exhibit C, to Carter recitəs the title conveyed to him, in full. Yet, no Indian was there, and has not appeared upon the scene at any time. Carter saw the power of attorney from Bourke to Wallace executed in 1883, giving him power to sell lands, under the location of this scrip 430 C., 80 acres in Shoshone County, Idaho, when the the certificate of location of the very scrip itself, was not made until more than three years aftewards, in 1886: besides he saw the original power, and all the defects were patent to him. The tract covered by the scrip was not the Indian's, but was surveyed as a tract of Wallace's, a placer claim. (See Trans. page 35, folio 63.) Whatever Carter bought he bought with his eyes open, and knew that the whole transaction was a fraud upon the law of 1854, and against law, and in no sense can he be said to have bought in good faith.

We will not argue the question that the proper authorities of the Land Department had the right to issue this duplicate scrip, nor to bring in question their conduct. They had the power and their action is final. One thing is final, and that is that Bourke got his 80 acres called for by this scrip, and that the scrip is satisfied, as well as the law of July 17th, 1854.

What are the rights of Plaintiff under his deed from Bourke?

We care not how he entered upon the ground in dispute, whether without, or under the deed. He must rely upon actual prior possession as against the defendants.

We contend that the scrip location was void, and after its cancellation any pretended occupancy of public lands under it is a trespass.

2 U. S. Land Decisions, 505.

Id. No. 1419, 1435, 1449, 1552, 1534 and 1583.

3 U. S. Land Decisions, pg. 45.

3 U. S. Land No. 327.

Plaintiffs rely upon *Walsh* vs. *Hill*, 38 Cal., 481. The case does not apply, and the doctrine there contended for, we admit is the law as established in California.

Say the Court on page 487:

"The Court below considered this case as belonging to a "class of cases of which *Gunn* vs. *Bates*, 6 Cal., 272, (down to "and including some dozen cases,) *Ayres* vs. *Bensley*, 32 Cal., "620, are examples. The doctrine established in this State "by these cases is that a party who enters into actual possession of a portion of a tract of land claiming the whole under "a deed, in which the entire tract is described by metes and "bounds is not limited in his possession to his actual enclosure "or possession, but acquires constructive possession to the "entire tract, if it is not in the adverse possession of any "other person at the time of his entry, and that such person "in an action will prevail against one who enters subsequently "upon the unenclosed part as a mere intruder, or showing "color of title only."

We contend that this was not the case of the Plaintiff either as to his deed or his entry thereunder, nor does the admission of the evidence showing the cancellation of the Sioux Half-breed Scrip location conflict with his rights if he entered under his deed, Exhibit C; but on the contrary such rights are protected, specifically under the instructions of the Court, (Trans. folio 224,) being instruction No. 3, (Trans. page 119).

"But I now instruct you, in an action like this in the U. S. "Courts, such certificate issued by a land office, of an entry "of land, cannot be received as any evidence of legal title, "and the deed referred to being based upon such entry "cannot be considered as evidence of such title, you will

" entirely disregard them, and that the only consideration you " can give to either said certificate of entry or said deed is " *as evidence* to explain Plaintiff's original entry upon the " premises, to *explain his claim* to the possession thereof, and " to show his good faith in the claim he asserts. Evidence " has been introduced by defendants to show that this Sioux " Scrip has been cancelled and that all entries made under it " including the premises in dispute, are void. But this cannot " affect the certificate of entry or the deed as evidence for the " purpose above stated, etc., to explain his claim to the pos- " session thereof."

The Court, under this instruction clearly brought the case within the rule of *Walsh* vs. *Hill*, as contended for.

Again; the Court further instructed on 4th instruction (Trans., folio (225), as follows: "The Defendants do not " show or claim any title in fee to the premises, and the Plain- " tiff having failed to show any, it follows so far as the evi- " dence in this case advises us, that the real title remains in " the Government of the United States. It then results that " there is but one question left for you to determine, to wit: " had the Plaintiff at the time Defendanats entered upon the " ground on the 19th day of February, 1889, such control, " ownership and possession over the premises as gave him a " superior right to its possession over that which the Defend- " ants had. If he was there in the lawful possession of it, the " Defendants had no right to enter upon it, and cannot hold " the possession they took. If Plaintiff was not then in the " lawful possession, the Defendauts had the righ to enter, and " can remain thereon."

We submit to the Court, that the instructions of the Court 5, 6 and 7 (Trans., folios 225, 226 and 227). are full and clear upon the question of possession, and are fair and favorable to the Plaintiff, and everything he contends for. An inspection of them will satisfy the Court that Plaintiff has nothing to complain of.

V.

There is nothing in the exception No. 11.

The map of the N. P. R. R. was competent to show that the lands upon which the attempted location of Sioux Half-breed

Script was laid, were lands already granted, and upon which even the attempt to locate said scrip was void.

Exception No 12, to the admission of the Articles of Incorporation, Exhibit No. 10, is not well taken.

The Court in its instruction (Trans. folio 226) expressly applies the rule in *Doll* vs. *Meador*, 16 Cal., 321 quoted in Plaintiff's brief· "If Plaintiff therefore was at the time alleged, February "19th, 1889, in the lawful possession of the land, any attempt "to organize it into a town, under such act, cannot operate to "deprive him of such lawful possession."

Exceptions Nos. 14 and 15, to the introduction of the notices placed upon the lots 2 and 4 by Defendant Ruddy, and upon 6 and 8 by Defendant Murray, at the time of their entry and location of the same is not well taken.

The posting of the notices was allowed, as an act of location, and evioence of one of the acts constituting such location, and therefore competent testimony.

VI.

The 16, 17 and 18 assignments of error assigned from page 22 to 26 of Plaintiff's brief, are not well taken.

The proposition (page 23, Brief) that "by the location of "the Sioux Half-breed Scrip the title of the United States "passed to the grantee" we will not argue.

What has been said upon this matter above, is an answer in full. Bourke has already got his 80 acres for the scrip 430 C, by locating it on lands in Dakota, for which he received his patent in 1881.

Patents are required and are necessary, and such has always been the practice of ths Department.

The whole case rested upon possession, a question which the Plaintiff's Counsel did not meet in the Court below, and have not met here in their brief. The statement of facts on page 25 and 26 is not correct, but we refer the Court to the statement in this brief, and the references to the Transcript therein.

The possession to support ejectment upon the public lands of the United States, must be open, notorious and actual, to the exclusion of anyone else.

Sealing vs. Marsuch, 24 U. S., 296.

Wilson vs. Fine, 38 Fed. R. 790.

Christy vs. Scott, 14 Howard, 282.

Hooper vs. Scheimer, 23 Howard, 235.

Fenn vs. Holme, 21 Howard, 481.

The possession must be actual and not constructive.

Feirbaugh vs. Masterson, 1 Idaho, 135.

Coryell vs. Cain, 16 Cal., 567.

Actual possession is necessary upon the public lands to bring ejectment. Constructive possession insufficient.

Rivers vs. Burbanks, 13 Nevada, 408.

Eureka Mining Co., vs. Way, 11 Nevada, 171.

Brumagim vs. Bradshaw, 39 Cal., 41.

LeRoy vs. Cunningham, 44 Cal., 602.

Gray vs. Collins, 42 Cal., 156.

Tyler on Ejectment, § § 888, 891, 899, 900, 904 and 905.

Entry upon land, under a conveyance by metes and bounds, the actual possession of a part draws after it the constructive, possession of the whole tract to the calls of the deed. But from the authorities above cited, actual and not constructive is the test."

But when the land is cut up into lots, occupancy of one is not of the others, as entry and possession of one under conveyance which embraces several, cannot be extended by construction to other lots not actually occupied.

Woods on Limitation of Actions, § 262.

In this connection we refer the Court to § 4040 to 4043 and 4556 laws of Idaho, which we contend should be the rule of decision governing the case, under the authorities, and § 721, R. S. of the United States.

Burgess vs. Seligman, 107 U. S., 20.

Gould and Tuckers Notes on R. S. of U. S. p. 93.

Limited to local law of the State.

Swift vs. Tyson, 16 Peters, 1.

Rules affecting possession in the State must control the Federal Courts.

Bucher vs. Railroad, 125 U. S., 583.

Hazard vs. Vermont and C. R. Co., 17 Fed., 753.

Turner vs. Peoples Ferry Co., 21 Fed., R. 94.

Vide Boyce vs. Tabb, 18 Wallace, 548.

These statutes of Idaho, giving the statutory rule upon possession is binding on this Court, and this case.

Orvis vs. Powell, 8 Otto, 176.

98 U.S., 176.

It is a remedy in respect to real estate, and the rule is that such remedies are to be pursued according to the law of the place where the estate is situated.

Robinson vs. Campbell, 3 Wheat, 212-219.

The local laws of the States are rules governing property, and the construction by the States tribunal governs the Federal Courts.

Green vs. Neal, 6 Peters, 291.

Harpending vs. Dutch Church, 16 Peters, 455.

Andreae vs. Redfield, 98 U. S., 235.

Amy vs. Dubuque, 98 U. S., 471.

Davie vs. Briggs, 97 U. S., 637-638.

Suydam vs. Williamson, 14 Howard, 427.

Local statutes are those as affect property within the State.

Swift vs. Tyson, 16, Peters, 1.

Repeated decisions of the Supreme Court has established the doctrine that the Federal Courts adopt the local laws of real property as ascertained by the decisions of the State Courts, whether the decisions are grounded on the construction of the

statutes of the State, or form a part of the unwritten law of the State which has become a fixed rule of property.

Jackson vs. Chew, 12 Wheat, 153.

Daly vs. James, 8 Wheat, 495.

Henderson vs. Griffin, 5 Pet, 151.

Vide 7 Heward, 1 and cases cited.

Morgan vs. Curtenius, 20 Howard 1.

Sections 4556 and 4040, laws of Idaho, are rules of evidence as well as statutes affecting realty. Hence the rules of evidence prescribed by the laws of a state are rules of decision for the U. S. Courts while sitting within the limits of such stute (within §722, R S. of U. S.

Haussknecht vs. Claypool, 1 Black, 431.

Chicago vs. Robbins, 2 Blatk, 418, 428.

Christy vs. Pridgeon, 4, Wallace, 203.

Shelby vs. Guy, 11 Wheat, 367.

Nichols vs. Levy, 5 Wallace, 433.

Boyce vs. Tabb, 18 Wallace, 548.

Sec. 4556, laws of Idaho, was passed in 1864, immediately after the organization of the territory, has stood upon the statute books of the Territory while a Territory, and under the rule laid down in *Chester* vs. *Englebrecht*, 80 U. S 446, has been ratified by Congress. The Act was again ratified by the Constitution of Idaho, and by the admission of the State, again ratified by Congress.

We urge that it is the rule of decision in this case.

Sec. 4040, Statutes of Idaho, provides that where the occupant or those under whom he claims entered into possession of the property under claim of title, upon a written instrument, and that there has been a continued occupation and possession of the property included in such instrument, or of some part of the property, etc., for 5 years, the property is deemed to have been held adversely "except that when it consists of a "tract divided into lots, the possession of one lot is not a "possession of any other lot of the same tract."

Section 4,556 Laws of Idaho, provides:

"In an action for the possession of, or for any injury done " to a lot or parcel of land situated in any city, town or village, " on the public lands. the Plaintiff must be required to prove " either an actual inclosure of the whole lot claimed by him, " or the erection of a dwelling house or other substantial " building on some part thereof by himself, or some person " through whom he claims; and proof of such building with or " without inclosure, is sufficient to hold such lot or parcel to " the bounds thereof, as indicated by the plat of such city, town " or village, if there be one, or if there be no such plat, then to " hold the same with its full width and extent from and in- " cluding such building to the nearest adjacent street, when " the intervening space has not been previously claimed by " adverse possession."

The Court below refused to give this statute upon the question of possession, but gave instruction 5 (Folio 225 of Trans.) and instruction 8 (Trans. folio 228) which were much more favorable to the Plaintiff.

Either the Plaintiff entered under the deed or he did not. Howes says he took possession in July, if cutting the timber for the mill was possession. Carter says the deed was not delivered until October, and then the entry was had, by still cutting off the timber..

The deed itself calls for block 22, consisting of twenty-four town lots, 25 x 100 feet.

Trask says he surveyed the tract into lots on June 1st and 2nd, 1886, platted it and surveyed it, and marked it upon the ground; block 22 as well as other blocks, he staked upon the ground into lots, placing corner posts for the block, and stakes for the lots twenty-five feet apart, on the front of the lots. There was an alley-way twenty-five feet wide in the middle of the block, and the lots faced south on Bank street, and north on Cedar street, called in the deed Lockey street, and running back one hundred feet to the alley-way. Exhibit 13 is a copy of the map made by Trask for Wallace and was the regular map recognized as the map of the town.

Carter saw this map and bought under and according to it. The cross-examination of Carter will satisfy the Court upon

this point. If he entered upon the whole block, how can he claim the north half as an entirety, and separate from the south half? What has become of the alley-way?

He treated the tract or block not as one parcel but as 24 lots. He sold lot 5 to McKissick, being in the south half of the block; lot 17 to Strack; lot 7 to H. E. Howes; the north 25 feet of lots 1 and 3 to Sherwin; all situated in the south half of the block.

He built a house on lot 12 and another one on lot 20 in 1887 and 1888.

The sidewalk has already been ventilated.

And the water scheme has been fully shown.

The Block 22 was never cleared; the merchantable lumber had been cut off and hauled to the mill, and snags, stubs, stumps and down timber left; in fact, the land was in a less valuable condition than when Carter found it.

The tax receipts, Exhibits F and G, which furnish no evidence of possession, show as above stated, that the lots, by their numbers specifically, and not the block were listed and assessed to him.

We can then conclusively affirm, that the tract consisted of seperate and distinct lots, and the Plaintiff was compelled to show, actual prior possession of each lot entered, claimed and held by each Defendant respectively.

As to this possession, under the charge, the matter was left to the jury, and they found against the Plaintiff. We do not think the Court will disturb this verdict.

VII.

We pass by the 20, 21, 22 and 24 Exceptions of the Plaintiff, and the hyper-criticizm of the Plaintiff's Counsel upon the instructions of the Court, from the 26 to 29 pages of their brief.

The instructions of the Court are more favorable to the Plaintiff than the facts call for, but on the whole case gave the law, and the Plaintiff cannot complain.

The 13 instruction asked for by Plaintiff, on pages 29 to 33 of Plff's brief are not law, and not warranted by the facts of the case, and were properly refused. We ask the Court to read the instructions of the Court below as given (folios 220 to 232 inclusive, Trans.), and they will find every right of Plaintiff has been fully protected, and the law upon the facts properly given to the jury.

VIII.

Lastly, we again renew our motion to dismiss, upon the ground of the want of jurisdiction.

1st. There is no federal question involved.

2nd. There is no diverse citizenship.

In conclusion, to the invective contained in the peroration of Plaintiff's brief, we beg to state that neither the facts or the law justify any such invective. The Defendants or the other inhabitants of Wallace who located lots in that town in February, 1889—some hundreds in number—are not highwaymen, but men who in good faith as such inhabitants, under the spirit of the laws of the United States (Sec. 2,382 to 2,387 R. S. of U. S.) regulating the settlement of towns, located and occupied the said lots, and proceeded to erect houses and buildings thereon. This tract of 80 acres is the only spot in that section upon which a town could be built. Three canyons meet in this little basin, and in and around those canyons are situated mines, large in number, and of proved richness, and apparently inexhaustable. Nature made it a townsite and covered it with a dense growth of fine timber. Wallace saw its possibilities, and attempted to get the title. Fresh from the forests of Wisconsin—a timber man for years—with his man Howes, the Plaintiff comes to the spot, and as a trespasser upon the public domain, proceeds to cut down and saw up the timber for sale, rendering himself amenable to the penal laws of the Government, and calls it improvement. He buys the timber off the whole tract and proceeds to cut down and saw up the same. He knew the title he was buying was worthless. He becomes a member of the Wallace Townsite Company, to whom Wallace conveyed the whole of the tract covered by the attempted Sioux Scrip location.

The cancellation of the location was made in January, 1887, and it is fair to presume that the Townsite Company knew it. For two years this Company continued to sell lots, after such notice, and finally two years after its cancellation, it became known that the Sioux Scrip location had been cancelled, the inhabitants of Wallace entered upon the unoccupied lots, several hundred in number, as of right they could do, and located the same. These men are highwaymen, while this man of affluence, after cutting up all the timber on the tract, and selling the same at high prices in open violation of the law, is termed a benefactor, and his timber trespasses upon the public domain, is classed by his Counsel as improvement.

Having exhausted the wood he turns his attention to the water, and capturing that, brings it into the town, and selling it to the inhabitants, calls that improvement No. 2. Could he have captured the air, he would doubtless have done so, and peddled that out to the inhabitants of Wallace, and called that improvement No- 3.

There was an attempt to show that he had brought in electric lights, and to show thereby the further improvement of Block 22, but this was ruled out. The wretched pretext of a sidewalk, so called, and an attempted inclosure thereby of the whole block, was also shown; but it was conclusively proved that it was a footway merely, built for the purpose of bringing travelers from the railway depot to his hostelry. The ordinary trail traveled was from the northwest corner of Block 22, through lots 2 and 4, south to Bank Street, and through and over the block, and this was not stopped until the location, in February, 1889, by Ruddy, and the fencing of lots 2 and 4.

There was no possession, and no evidence of possession of the lots or either of them, located by the defendants, at the time of their entry.

The verdict counsel say was astounding. The jury simply did not believe either Carter or Howes, and hence their verdict, with which conclusion of the jury this Court will fully concur upon a careful inspection of the transcript.

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